Privatisation, Outsourcing and Employment Relations in Israel

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Over the past three decades, most industrialised nations have been increasingly using private intermediaries in the provision of public services. This trend is noticeable in the social services (health, education and welfare) but is also common in areas that were traditionally viewed as "inherently governmental" such as security, justice and immigration. Such reforms are referred to as "partial privatisation", "outsourcing" or "contracting out", the latter indicating the legal nature of the relationship between the government and the private provider.

It is difficult to overstate the importance and ramifications of contracting out as a policy, in light of it depth and breadth. In the United States, for example, over 50 per cent of publicly funded government services are provided by private intermediaries (Minow and Freeman 2009). In Britain, as early as 1995, Mark Freedland noted the British Civil Service was reduced to its lowest level since the Second World War, and the expectation was that this fall would continue (Freedland 1995a). Elsewhere, Freedland expressed concern that, under the guise of a "little and mechanical" reform, the British government managed to change constitutional aspects of governance through the seemingly innocuous policy of contracting out (Freedland 1995b, 23).

So while 'pure' privatisation of public companies has attracted attention and appraisal, the silent, partial privatisation of public (and especially – social) services has continued and expanded without the same level of scrutiny (Donahue and Zeckhauser 2012). Outsourcing has now been implemented in highly sensitive areas, such as child protection and probation services; in areas of governance, such as regulation and supervision; and, somewhat ironically, in the preparation of the outsourcing and procurement process itself (Diller 2000; Freeman 2003; Marciano, this volume; Kariv, this volume). Another aspect of the expansion of outsourcing concerns the identity of the private entities with which government engages to provide the service. While, in the past, partial privatisation referred to government funding of non-profits, contemporary outsourcing includes a significant increase in the number and weight of for-profit companies providing services (Gilman 2001; Salamon 2001).

Far from being an exception to the rule, Israel has embraced these policies with almost unparalleled enthusiasm (Dotan 2015). In practical terms, this has meant incrementally replacing government employees with workers employed by intermediaries. Nurses, social workers, teachers, engineers, environmental technicians and numerous others are now more likely to be employed by non-governmental and for-profit organizations than by the Israeli civil service.

How did this come to pass?

1. Labour law and the Outsourcing of Public Services

Accepted wisdom suggests that the neoliberal streak, which was latent and disparaged in Israel's first 30 years, gained credence, ideologically and professionally, following the financial meltdown that occurred in the early 1980s. Shafir and Peled, for example, suggest that such a significant institutional change is likely to take place at times of "punctured equilibrium" because the crisis of the state provides institutional entrepreneurs with more autonomy and incentive to satisfy their mobilized constituencies. They argue that the economic crisis of the early 1980s created the sort of "puncture" that enabled the re-evaluation of the incorporation regime itself (Shafir and Peled 2002, 19, 240). Emergency powers were employed to order the government and local authorities to reduce the number of public employees immediately, and significantly.[1] Regulations provided that collective agreements and Civil Service Commission's regulations will not apply. Challenges in the National Employment Tribunal and in the Supreme Court were not successful.[2] And so, in the first instance, ancillary services, such as security, construction and cleaning were transferred to private contractors. In the 1990s, pressures increased to expand the use of outsourcing (Galnoor 2011). Government departments and municipalities began outsourcing services that ranged from court secretarial services to nurses, dentists, social workers and teachers. Unlike their government-employed co-workers, these service providers are commonly employed on a 'zero hour contract' basis, do not benefit from employment related social benefits, days of rest, educational funds, protection against unfair dismissal, and so forth (Harel-Ben-Shahar, this volume). The use of intermediaries expanded to such a degree that teachers were employed through non-governmental entities to teach all subjects, including core courses, in contravention of the Ministry of Education's directives (Wergen 2011; Davidov 2015; Harel Ben-Shachar, this volume).

The study of outsourcing provides in Israel thus provides a fascinating case study for rapid policy and institutional change, which has an important effect on Israeli labour relations, all of which we address in this chapter. But less obvious, the legislation and litigation over the rights of workers who are subject to outsourcing offers insights into legal action, industry reaction, and legislative and judicial responses, and so forth. It is, in other words, a lesson in the role of law in society, and the role of the social in law.

The social and economic trends of the 1980s and 1990s have, perhaps, changed the background for labour law in a manner that has not been visible since the industrial revolution. Indeed, one may view current trends as a counter-revolution. If mass production led to the decline of intermediate forms of labour sub-contracting (Deakin 2002), and even to the outlawing of such relations (Freedland 2003), the current trends seem to view the engagement of sub-contracting as a necessary strategy in a

[1] Articles 11, 12 of the *Emergency Regulations (Provisions for Economic Emergency)* (1985).
[2] Labour Case 46/4-13 *State of Israel v. the Histadrut* LC 14, 181; HCJ 90/86 *The Histadrut v. the National Employment Tribunal* 40(3) 318.

globalised, specialised world, and labour law, for its part, all but embraces and encourages such structures.

What are the motivations behind such changes? Despite it being a global phenomenon, at least in industrialised nations, different legal backgrounds, social cultures and economic forces in each nation lead to important differences in the motivation for the turn to subcontracting and thus, to important nuances in the way the outsourcing is regulated. But across nations, it is easy to identify the role of employment relations, and employment law, as a strong facet in arguments for and against outsourcing in the public sector. Most obviously, civil service constraints, such as post limits, do not apply in the private sector. The role of unions is much more visible in the public sector, and therefore reducing their power and role is much more visible as a motivation there (McCrudden 2007). Through outsourcing of social services, governments try to "remove that workforce from the ambit of public sector bargaining" (Davies and Freedland 1993, 622). And deriving from these two concerns, the public sector is viewed as far less flexible, and managers' ability to adapt to a rapidly changing economic and technological environment as far more limited (Deakin and Walsh 1996; Savas 2000). New public management theories and policies have thus been advanced to increase managerial flexibility, which has at its heart employment flexibility, into the public sector (Deakin and Reed 2000).

How does outsourcing lead to flexibility? Outsourcing changes the employment relationship, from a bilateral relationship to a tri-lateral one. While, in the past, those employed in a wide range of services were employed directly by the principal, or end-user (e.g. the bank, or the government), this structure has been replaced with a triangular employment relationship (Prassl 2016). Following outsourcing, the employees will often be considered to be employed by the contractor, who has a contractual, business relation with the end-user.[3] The business contract between the end-user and the contractor may be renewed or terminated according to the terms set therein. In addition, the terms of the contract between the contractor and his employees commonly offer more convenient clauses for the termination of the employment relationship, when compared to the typical employment contracts in the government sector. The flexibility is achieved, per the theory, on both sides of the triangle.

This is not the place to ascertain whether outsourcing indeed leads to the desired flexibility. As we see below, there are, in fact, claims that the end-user (in this case – the government) becomes increasingly dependent on the contractor, thus replacing one form of inflexibility (due to the constraints laid by collective agreements) with another.

And so, as the motivation for governments to engage in outsourcing becomes clearer, courts may become increasingly occupied with the need to look beyond the contractual framework, and to

[3] An exception to this rule is Britain, where idiosyncratic case law has led to agency workers being denied employment status at all. In other words, neither the contractor nor the end-user is considered to be their employer.

differentiate between 'authentic', bone fide outsourcing and fictitious, or 'sham' constructions (Davies 2012; Bogg 2012), that are created with no true institutional objective (such as making use of business expertise that does not exist inside the government) but deprive employees of rights that otherwise would have been granted to them. The tests employed by Israeli courts to differentiate between the two forms of outsourcing, and the government's response, frame the legal focus of this chapter.

2. The Legal Trajectory, and Tragedy of Good Intentions

Two Types of Outsourcing

The term "outsourcing" contains two main sub-categories. The first may be termed as the "outsourcing of personnel", and is often associated with *temporary* agency workers. An agency, in this case, supplies workers to assist a client with a temporary need due to maternity leave, annual leave, unexpected resignation, etc. In the second case, "outsourcing of services" occurs when identifiable sectors in are transferred to a private company as a whole. Where outsourcing of services is concerned, sectors such as cleaning, IT services or maintenance may be carried out by private companies. These examples are not completely arbitrary. The sectors that were originally most prone to outsourcing were those that do not constitute part of the enterprise's core operations.

In the early 21st century, the distinction between the two types of outsourcing became crucial in the Israeli legal context. The reason for this is that the *Manpower Act* 1996 regulates Temporary Work Agencies, guarantees temporary workers right to equal term and conditions when compared to those employed directly by the end user and, crucially, from 2008, section 12A mandates that agency employees who have been assigned to an end user will be deemed as the end user's employees after nine months. It should be stressed that this act (and, of course, this section) applies solely to the outsourcing of personnel, but not to the outsourcing of services.

On the face of it, the distinction between outsourcing of personnel and outsourcing of services is clear. The first involves the temporary employment of individual workers through an intermediary to address a particular business need (employee on maternity leave, sudden influx in demand, etc). The second refers to the permanent transfer of an identifiable segment of the company, government department or government agency, to a private entity, which will be tasked with producing outputs: e.g. a clean a building, provide lunch, or maintain security. In Israel, the distinction with regards to workers' rights is also very clear. Workers in one, highly regulated form of triangular employment – outsourcing of personnel - have legally guaranteed rights to equal treatment when compared with workers employed by the end user (the government or local authority, in this case), and may hope to gain full status as government employees, including job security, if they are employed in this role for over 9 months. In contrast, workers in the other, highly deregulated form of triangular employment – outsourcing of

services – are denied all these rights. While this portrayal may suggest a clear delineation between the two types of outsourcing, in reality things are far more complex.

Let us start at the outset. When section 12A passed as an amendment to the Manpower Act in 2000, the Israeli government, by far the greatest employer of agency workers, was anxious about its ramifications, since its immediate implementation would mean a massive extension of the public sector (those employed over 9 months will be incorporated into the end user – the civil service itself). It therefore opposed the section, and deferred the date of its entry into force for 8 years. The reason for the state's objection is thus apparent. What could explain the sudden withdrawal from years of opposition?

The reason is legalistic, and simple: the government re-categorised the workers as "service providers", which are not under the scope of the *Manpower Law* and cannot benefit from its provisions. The numbers tell a very clear story. While 10,000 'outsourced personnel' were employed by the government in the year 2000, by early 2009, there were only 150 such workers in *all* government ministries, and they were employed only as a last resort, for up to six months. For the first time, the State Accountant began publishing detailing the number of 'outsourced personnel' in all ministries (State Accountant 2010). The General Accountant directed all government entities (ministries and corporations) that "in general, no employment of agency workers will be authorized" (State Accountant 2008, sec. 1.1).

The situation regarding employees in the 'outsourced services' is dramatically different. As they are not covered by the Manpower Act, there are no sanctions for their long term employment. Therefore, no account is needed for their identity, number, rights or cost. In fact, the General Accountant's report, just noted, states explicitly that the government entities were not asked to report the number of employees employed through service providers (as opposed to those employed through 'personnel contractors'). One may think that this change of direction, problematic as it may be, was effected by government agents discontinuing contracts with personnel contractors, and transferring the activities to service providers. However, in many cases, the 'reform' had a much more legalistic, and even cynical, character: personnel agencies of yesteryear began branding themselves as service providers. Thus, when the Israel's Ministry of Health (MoH) was asked by the State Comptroller how it plans to restructure its engagement with the Association for Health Services, a contractor which provided 4500 workers to the MoH, the latter's General Manager replied that the MoH plans to "move from a 'personnel contractor' to a 'service provider contractor' model" (State Comptroller 2009, 474). Needless to say, the change of models did not require changing the identity of the (personnel/service) provider.

So outsourcing of services has expanded from the periphery of public services into their core, carrying with it tens of thousands of workers – teachers, nurses, psychologists, civil engineers -

employed on a long term basis to perform a public service, whilst being denied the rights of civil servants. While this would, facially, be a case of outsourcing personnel, government departments and agencies categorised it as outsourcing services, so as to avoid the reach of the Manpower Act. As Avilés (2010) notes, 'in quite a few cases the contracting-out is essentially reduced to the labour force alone, [thus raising] the old problem of pseudo-contracting and of labour-only contracting' (in Freedland and Kountouris 2012, 115). Moreover, it should be stressed that this case of camouflage was motivated by the desire to circumvent regulation (of personnel outsourcing) that itself was designed to secure agency workers' rights. Perhaps even here this experience is not limited to Israel, as others have commented on the Sisyphean process that "every time law manage(d) to regulate an employment relationship, another atypical employment relationship (would come) immediately into being, frustrating the restraints envisaged by the regulations" (in Kountouris 2007, 44). One may argue, at this point, that it is for the courts to stand fast against such attempts. However, the truly good intentions of the courts, we find now, have led to similar, more unfortunate results for workers and for the services they provide.

The Challenge for the Courts: Socio-Legal Dynamics of Employment Relations

Israeli workers who were subject to these reforms were not oblivious to the government's true intentions, and on more than a few occasions brought legal challenges, the essence of which suggested that their employment should be perceived as personnel, and not as service, outsourcing. In determining these challenges, the Israeli Employment Tribunals developed a jurisprudence that distinguishes between an "authentic" triangular business relationship and a "fictitious" triangular relationship. In the former, the end-user truly requires the services of an external provider for the performance of a designated task and the provider is expected to produce an output. In the latter case, the structure of service provision is, to use the British terminology, a 'sham' that masks the fact that the intermediary serves as a manpower agency as "little more than a funnel for the transfer of wages" (Davidov 2015, 10), so as to deny employees their rights. While the former is legitimate, employment tribunals found that the latter is not, as it constitutes "contracting out of the collective agreement, in a manner which conflicts with the fundamental notions of labour law".[4]

As the parallel to British jurisprudence in this area has already been noted, it is interesting to note that two early cases reveal striking similarities not only in the judicial approach, but even in the facts of the case. In both cases, a triangular relationship was established by the government to *assist* workers who would otherwise not manage to find suitable employment in the free market, on their own. In the Israeli case of *Hershkovitz*, a 71-year old immigrant was found employment in a government hospital as a pharmacist, despite having minimal command of (Hebrew) language and a different professional background.[5] His wages were paid, in part, by a corporation set up by the government to

[4] LA 57/3-54 *Lankri v A.N.S. Co for Maintenance of the Disabled* PDA 36, 361, 364-365 (1981)
[5] LA 129-3 *Hershkovitz v. the State of Israel* PDA 12, 255 (1981).

assist the disabled, Hamshakem, which operates as a sheltered workshop. In the British case of *Bearman*, two disabled workers were found employment with the Employment Service through the Sheltered Protection Scheme operated by the Royal British Legion Industries.[6] In both cases, the workers demanded status as government employees, with all the rights that such a status entails. In both cases, their requests were denied, with very similar reasonings.[7] Both judgments made note of the general public benefit of such schemes, which includes the benefit to members of the same group to which the plaintiffs belong. They suggest that this form of triangular employment is not meant to disenfranchise workers, but rather to benefit them in a manner that would not have been possible under the traditional, market-based contract of employment. Therefore, there is "nothing in this structure that negates the foundational elements of labour law".[8]

But as outsourcing became more prominent, and less benign, Israeli employment tribunals have moved from submissiveness (to government policy) to scepticism (as to government's intentions). Tribunals were no longer willing to view all triangular relationships as "authentic", and were increasingly ready to view them as "fictitious". The result of such an assertion would be that the claimant would be entitled to almost all rights of civil servants, despite the fact that the she did not pass entry exams. Indeed, in some such cases, the NET held that the state cannot bar 'insourcing' of employees by arguing that they did not pass the entry exams after years of employing these workers in such fashion, since holding otherwise would allow it to benefit from its own harm.[9] And yet, in other cases, the same court held that the workers will be entitled to most rights as those employed directly in the civil service, but not to all. Thus, tenure and access to a beneficial ('budgetary') pension scheme will not be awarded, since the workers did not enter their role in the public service via the civil service.[10]

But before discussing possible remedies, analysis of the court's approach in determining the distinction between authentic and fictitious outsourcing is crucial to understanding the dynamics that followed. In general, the tribunals developed a series of tests, which revolve around one simple principle**: the stronger the association of the employee to the end-user's workplace, the stronger the tendency to see her as the employee of the end-user**. In contrast, **the greater the distance between the employee and the daily routine of the workplace, the more the court will be inclined to treat the worker as employed by the service provider**. This rationale seems reasonable, and a matter of common sense. If the worker is subject to the control of the end-user,[11] takes part in day-to-

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[6] *Secretary of State for Education and Employment v Bearman* [1998] IRLR 431.
[7] *Bearman*, at 434.
[8] *Hershkovitz*, at [8].
[9] LA 1189/00 *Levinger v the State of Israel* (unpublished); see also LA 168/05 *Nakash v the State of Israel* (unpublished); LA 326/03 *The State of Israel v Chepkov* (unpublished).
[10] LA 273/03 *Schwab v the State of Israel* (unpublished); LA 410/06 *Fahum v the State of Israel* (unpublished); LA 1596/06 *Moyal v the State of Israel – Ministry of Welfare* (unpublished)
[11] *Ready Mixed Concrete (South East) LTDv Minister for Pensions and National Insurance* [1968] 2 QB 497, 515.

day activities of the organisation, is integrated in the end-user's hierarchy, and is subject to its policy and disciplinary procedures, then the formal, contractual structure may be regarded as fictitious, or a 'sham'. In contrast, increasing the "distance" – physical and managerial – between the end user and the worker by 'the displacement of employment contracts by commercial contracts' (Atkinson 1987, 87) will disconnect the legal responsibility of the end-user to the worker, since it reduces the likelihood that an employment relationship exists between the two.

Though this rationale was never declared in such a straightforward fashion, it may be traced back to the leading judgment of *Kfar Ruth* (Ruth Village),[12] the first case of a trilateral employment relationship which exhibited the National Employment Tribunal's (NET's) sceptical approach. Towards that end, the court identified a series of tests: who has the power to dismiss the worker and who should receive notice of resignation; who hired the worker; who sets the terms of employment, including payment and benefits; who supervises the worker's work; who authorises the worker's leave and vacations; who *truly* (and not as a channel) bears responsibility for the worker's pay; who owns the equipment, the material and tools that the worker uses in his work.

Following *Kfar Ruth*, the employment tribunals followed these tests to determine whether the outsourcing was authentic or fictitious. Thus, the NET found the outsourcing initiated by the Department of Education (in *Aloni*[13]) and the National Insurance Institute (in *Dayan*[14]) to be fictitious, based on the original *Kfar Ruth* tests. Justice Davidov-Motola explains in *Aloni*:

> Application of the *Kfar Ruth* tests reveals, therefore, that the selection of instructors was made, in effect, by the Department of Education; the power to dismiss was, substantively, in the hands of the Ministry of Education; and the wages and terms of employment were set, in effect, by the Ministry of Education. … The government decided on the material that the instructors were to work with, conducted training and supervised their work…[15]

Similarly, in *Dayan*, Justice Davidov-Motola relied on the fact that "the National Insurance Institute set the acceptance exams for workers; it decided on their posting and transfer based on need; it set the wages and fringe benefits; it directed the respondents [the workers] professionally on a daily basis … the contact between the respondents and the Institute was continuous and uninhibited, even when the contractors were replaced".[16]

But, well beyond the legal developments, it is important here to note their impact on employment reality. For the *Kfar Ruth* judgment was not perceived solely as a static tool to assess a given employment situation; rather, it has become an **employers' directive to plan their employment relationship in a manner that will knowingly distance themselves from the agency workers** (Weil

[12] LA 52/142-3 *Alharniyat v Kfar Ruth* 535
[13] LA 602/09 *The State of Israel – Ministry of Education v Aloni* (unpublished).
[14] LA 6818-10-10 *The National Insurance Institute v Dayan* (unpublished).
[15] *Aloni* (note 13) at [41]
[16] *Dayan* (note 14) at [28]

2013, 188, 196). Concretely, end-users, including government departments and agencies, now seek to avoid professional or personal contact with agency workers so as not to create the appearance of a worker's association to the workplace. One example for such a state of affairs became evident during the litigation brought by several secretaries who were employed, by a service provider, at the Israeli Revenue Service.[17] Justice Rosenfeld describes how, "prior to the claim brought by the plaintiffs, some of the secretaries who are plaintiffs in this case, sat in the same room as secretaries who are government employees. Immediately following the submission of the motion to the court, … six secretaries who are government employees were placed in the 'small room', while the plaintiffs were moved to the 'big room'".[18] Ten years later, the present author was approached by workers employed, through an agency, by the Department of Social Services in Tel-Aviv. Upon hearing of the approach, the municipality's legal counsel instructed the department not to allow agency workers to enter the department building, to use department computers or to participate in staff meetings. The municipality was clear as to the aim of this instruction: workers cannot be perceived as having obtained the relevant ties to support the claim that they are employed directly by the municipality. These examples are part of a wider trend, in which employers began denying agency workers access to facilities enjoyed by regular staff members, such as eating in the canteen, transportation to and from the workplace, use of staff showers, and so forth (Weisberg 2012; Rabin-Margaliot 2009).

The force of the incentives set by the judicial tests was made manifest in the most significant school reform implemented at least since the turn of the century. As part of the Israeli government's reforms following the 2011 social justice protests, free after-school activities were set up for pre-school and grades 1 to 3. Since it did not wish to expand the number of teachers employed by the Ministry or by local authorities, the government decided that they will be employed by a contractor. And so, the tender documents state the contractor is the employer of the teachers, that no employment relations will exist between them and the Ministry, and that they will not be entitled to rights as government employees. Furthermore, the tender documents state that the contractor will operate from his office,[19] and that he will be responsible for recruiting and placing personnel, at his expense. The contractor's employees may not sit in the Ministry's offices, may not use government equipment, may not use official government letterhead, and may not sign documents in the name of the ministry.[20] Most tellingly, the effort to distance the contractor and his workers from the government was brought to an extreme by clarifying that the body responsible for **supervising** the effective execution of the project is … the contractor himself![21] Since close supervision by employees of the local authority at the school

[17] Labour (Jerusalem) 2513/00 *Zerifa v the State of Israel – Ministry of Finance* (unpublished).
[18] *Ibid*, at [6.4].
[19] Procurement No 17/6.2012 *Operating a comprehensive array of day care centers and additional programs* (7.6.2012), at [6.2]
[20] Ibid.
[21] Ibid, at [5.21]

could lead to the conclusion that the authority has outsourced the personnel, and *not* the services, the government had to distance itself even from the 'inherently governmental' task of supervising the work workers engaged by the contractor.

In summarizing this section, we find that the combination of two factors lead to an inherent failure in the framework of social services in Israel. First, the *institutional constraints* are such that government entities choose not to employ workers directly, but rather through contractors. The two main reasons, as indicated by local authorities and ministries in their responses to legal challenges, is cost awareness and post limits. Second, in the current *legal state of affairs*, the greater the control and supervision of the government authority over the work of outsourced employees, the greater the likelihood that the end-user will be considered the actual employer.[22] Correspondingly, it is suggested that the effects of outsourcing are both rights-based and institutional (Barak-Erez, 2009). In the next section, it is argued that the strong divide between workers employed directly by the government, on the one hand, and outsourced workers, on the other hand, has widened the gap in the two-tier economy, and has had an especially severe impact on minority and disempowered workers. In the section that follows, we assess the institutional consequences for Israeli public services that result from this state of affairs.

3. How outsourcing creates a two-tiered economy that disenfranchises workers

Discussion of outsourcing of public services tends to focus on their costs and quality as sole indications of their success, or failure. Far less attention is paid to the individuals immediately affected by the outsourcing, and instrumental in making it a success or failure – the workers involved. And yet, there is evidence that "agency work in inherently precarious" (Davies 2015: 506) and that outsourcing has contributed to the creation of a two-tiered workforce, and where it existed, to the widening and deepening of the gaps between the tiers (Flecker and Hermann 2012; Schulten and Brandt 2012).[23] This consequence is realized through the undermining of both collective and individual employment rights, with a particular focus on the right to equal treatment.

The Collective Perspective: Outsourcing and effects on Unions and Collective Bargaining

Outsourcing is often perceived as one prong in the general scheme of new public management, which has at its heart the aim to increase flexibility in the workforce. In this context, unions are portrayed as the main inhibitors of flexibility, since collective agreements limit the government's ability to dismiss workers, employ them on a casual basis, move workers from one task to another, and so forth. It is important to note that this focus suggests that advocates of this position admit, implicitly, that outsourcing is not an end in itself. Rather, the important goal is weakening the influence and power of unions to bargain collectively. For if the unions remain as influential following outsourcing, the aim (of

[22] *Dayan* (note 14) at [17], [20]
[23] *James v Greenwich Council* CA [2008] at [60]

flexibility) will not be achieved. And so, both advocates and opponents of outsourcing agree that outsourcing does manage to undermine union power. They differ, of course, as to whether this is a positive result.

Indeed, 'breaking' the unions is often stated by scholars, civil servants and politicians as one of the central aims of privatisation and outsourcing (van der Hoeven & Sziraczki 1997). Margaret Thatcher stated that she views privatisation as an important step to weaken trade unions to "reverse the corrupting effects of socialism" (Thatcher 1993, 676). The unions, for their part, were not oblivious to this position, stating at the time that "amongst the tactics that the current Conservative government employs to attack British workers, privatisation seems to be the most fatal" (Bickerstaffe 1983, 7). In Israel, former Prime Minister Itzhak Rabin dismissed fears that the largest trade union, the *Histadrut*, will militate against planned privatisation reforms, stating that he's "not worried about trade union objections to privatisation, just as [he's] not worried about Islamic terrorist groups seeking to derail the peace process" (cited in Katz 1997, 175). Note the striking parallels here, between trade unions and terrorist groups, on the one hand, and between privatisation and the peace process, on the other. The head of the Budget Division in the Ministry of Finance (and subsequently Head of the Prime Minister's office), Uri Yogev, noted as his greatest achievement his success in "breaking organized labor in Israel" (Arlozorov 2004). As for education sector, Yogev noted that there is still work to be done: "I think that we should push forward very aggressively towards abolishing all collective agreements for teachers" (ibid; also Katan 2007, 121).

It is true that collective agreements serve as the "regulatory engine" (Davies and Freedland 1989) that limits the freedoms that parties to an employment contract have to negotiate, and usually guarantees workers' rights beyond those secured by statute (Raday 1989; Summers 2001). Increasing flexibility, in the sense of expanding the parameters for contractual negotiation, could logically include limiting the coverage of collective agreements and the power of unions. But doing so has immediate effects for the power of workers in the employment relationship. Otto Kahn-Freund memorably highlighted the "inequality of bargaining power which is inherent and must be inherent in the employment relationship" (Davies and Freedland 1983, 18), leading him, and many others, to argue that it is collective bargaining that acts as a "countervailing power in the process of bargaining" (Langille 2011, 105-6). Indeed, reducing the power of unions undercuts the role of workers' power not only in the process of negotiating their terms and conditions of employment. Unions are instrumental as agents of information: they provide a crucial role not only in bargaining for additional rights but also in distributing knowledge and enforcing existing rights, a crucial function in the Israeli labour market, which exhibits serious flaws in these areas (Davidov 2005). Even more generally, the power of unions correlates to the social power of workers in the political process (Dukes 2014, 212).

Constraints of space bar us from delving into these wider implications. Therefore, focusing on the employment relationship, we note that outsourcing manages to exclude workers in a particular government agencies from the ambit of collective agreements that govern employment relations in that agency. Most directly, it thus allows employers to circumvent their obligations as dictated by the collective agreement, insofar as some workers are concerned (Raday, 1999). Less obviously, but as important, it splits the workforce and reduces the reach of the relevant union which, following outsourcing, does not represent the outsourced workers.

We find, then, that government outsourcing disempowers unions and shrinks the public sector. Both trends have similar consequences: narrowing the middle class and expanding inequalities. The reasons are simple: first, stronger unions are better placed to bargain for a larger portion of wages for the majority of workers (Kristal, Mundlak and Cohen 2006; Freeman 2005). Second, outsourcing allows employers to negotiate only with stronger groups of workers, thus creating a strong barrier, or a wider gap, between the primary and secondary labor market (Mundlak 1996, 235). Third, since, as is often is the case in Israel, stronger groups (Jewish men) are represented better in the union, the union's reaction to outsourcing is far more limited, and far less militant, than its objection to privatization as a whole. The combination of these two factors facilitates the rapid disenfranchisement of the terms and conditions of outsourced workers.

The Individual Perspective: The Construction of Legal Discrimination

Outsourcing may have a particularly detrimental effect on disempowered groups of workers within the industrial unit, for the simple reason that it allows for a selective, targeted reform (Fudge 2008). By separating groups of workers, outsourcing undermines worker solidarity, and separates stronger groups of workers, whose negotiating powers may benefit others, from weaker groups.

In the cleaning and security sectors, for example, women, immigrant Jews and migrant workers are over represented amongst agency workers (Taub 2015). Immigrant Jews, for example, who are commonly exploited in the Israeli labour market, constitute 61.5% of agency workers, almost double their representation in the general population (32%). Similarly, albeit less pronounced, 57.4% of agency workers are women, while their role in the labour market in general is 47%. Due to their demographic background, agency workers tend to be less aware of their rights, and even when they are aware, they are often reluctant to confront their employers to enforce these rights.

Against this background, the role of equality and non-discrimination becomes obvious, and multi-faceted. First, prior to outsourcing, individuals suffering discrimination on the basis of e.g. sex, race, or disability will be able to present the argument by referring to a relevant comparator that receives higher pay, or better treatment. This prospect disappears following outsourcing, since comparisons

across employing entities is not open to workers. To borrow two examples from the UK: in *Lawrence*,[24] following the outsourcing of school meals, 'dinner ladies' could not argue that their treatment was discriminatory when compared to those employed by the local authority. And in *Allonby*,[25] the outsourcing of teaching staff in higher education colleges barred female members of staff, employed by the agencies, from presenting equal pay arguments with respect to male members, who continued to be employed by the college (see Fredman 2004)

Second, affirmative action within the public sector for, inter alia, women, Arabs, immigrants and people with disabilities, is enshrined in primary legislation.[26] Since private employers are not required to employ affirmative action policies, outsourcing effectively reduces the number of, e.g. female, minority and disabled employees who stand to gain. A similar dynamic was documented in France (Gruziliet 2007, 18), and in the United States, where Ellen Dannin found that where 35% of the US Postal Service office workers had disabilities prior to privatisation, no such workers remained following privatisation (Dannin 2008, 1348-1349).

Somewhat related, the public sector also has guidelines in place to allow for a better work-life balance, thus making it a more attractive work environment for women. This may be one reason why 60% of public sector workers are women; within social services, they constitute 70% of the workers (Chason 2007); and amongst social and care workers – 90% (Levy 2008). The strong trend to outsource precisely these sectors thus has, and will have, a particularly detrimental effect on working conditions of women.

To summarise this point and to clarify: outsourcing allows the government to separate strong from weak sectors of the working population, and thus to deny the latter's right to equal treatment. The lack of union representation also denies agency workers one of its main benefits: knowledge and enforcement of legal rights. Following outsourcing, it is nigh impossible for an outsourced female, Arab or disabled worker to compare herself to a male, Jewish or able bodied worker, respectively (see *Allonby*). All these factors combine to increase social and economic inequalities and to hinder social and economic mobility.

4. Institutional effects

Outsourcing is often promoted for its role in improving public services. This is done, it is said, through the division of labour and the development of expertise through economies of scale and specialisation (Schulten and Böhlke 2012). In particular, the government focuses on 'steering' – initiating, directing, funding and regulating the policy; while the private contractor 'rows', or implements the policy.

[24] C-320/00 *Lawrence v Regent Office Care*, ECR I-7325 (ECJ).
[25] C-256/01 *Allonby v Accrington and Rosendale College* [2004] IRLR 224 (ECJ)
[26] Section 15A of the Civil Service Act (Appointments) 1959.

Government will develop expertise in strategic management, control of the environment as a whole, while the contractor will be distanced from the political realm.

Against this background, it is quite ironic that there is growing evidence that outsourcing has led to *lack* of organisational control, to *more* politicisation and to the *decline* of expertise, precisely the exacerbation of the problems that outsourcing was intended to address. The reason for this result lies partly in the dogmatic, ideological desire to reduce the number of workers employed in the public service in Israel. The 1985 Economic Stabilization plan, and the *Budget Fundamentals Law* (1985) that followed, mandated a 1 to 2 per cent yearly reduction of civil service posts. However, as the population grew (and the 1 million strong migration from the former Soviet Union on its own has led to a 20% increase in the Israeli population), *reducing* the number of civil service posts was unrealistic. Government departments found themselves, in the words of a Ministry of Justice official, in an "impossible bind. On the one hand, government units are mandated, by law, to provide certain services; on the other hand, post limits cast a shadow (to say the least) over the ability to uphold the law" (State Comptroller 2005:49). Outsourcing thus became a way to circumvent the post limits and still maintain the service (State Comptroller, 2000:741). Therefore, the employment of teachers through agencies has expanded as the budget for teaching hours has contracted (Wergen 2011). And the proportion of workers in the health service who hold civil service posts has dropped from 47 per cent in 1995 to 33 per cent in 2003; and in the care sector from 46 per cent to 35.6 per cent. Simultaneously, the proportion of workers employed through the "purchase of services and commodities" articles in government budgets grew from 47 per cent to 63 per cent in the health sector (Swirsky 2007, 11) and from 45 per cent to 57 per cent in the care sector (Chason 2007).

What have been the institutional effects of these changes?

Loss of Organizational Control, Politicization and Decline of Expertise

We saw that outsourcing created a mechanism to circumvent strict rules concerning minimum job qualifications and limiting political pressures on the civil service. Engaging private contractors, who are not subject to these rules, enables appointing individuals to perform a public service for which they are not qualified. The Deputy General Accountant of the Israeli Civil Service noted that "existing employment practices of outsourcing have created very serious difficulties in management, the use of resources and the effectiveness of government activities. This problem is also manifested by the employment of individuals with political ties for public services" (State Comptroller 2005, 49). The Civil Service Commissioner has given similar evidence to the State Comptroller, stating that agency workers who did not pass civil service entry exams and are not qualified for the public service are employed at all levels. Practically, they are not eligible for promotion but, because of their family and political ties, and because of their long years of service, cannot be removed from their posts. Often, the civil service decides to simply 'insource' these workers as civil service employees, circumventing the

entry procedures and requirements. In this way, for example, 950 postal workers were made part of the Israeli Postal Company, a government company (State Comptroller 2008A, 59; Civil Service Commission 2003, 2008).

Loss of control is also attributed to the lack of basic knowledge on personnel. Although outsourcing and privatisation is often justified as a means to enhance transparency in an organisation, it is striking to find how scant the data is, in Israel and elsewhere, as to the extent of workers employed by agencies, and the costs involved. The State Comptroller has repeatedly (1992, 1996, 2005) cautioned that "the Civil Service Commission does not collect information on those employed [indirectly]. In fact, information on their employment is not held by the departments, by the Accountant General, or by any other central body" (2005, 39). According to some estimates, 20% of workers employed by the government are contracted through service providers.

Two cases that reached the Israel Supreme Court offer some indication of the issues that may arise due to the ambiguity that characterises the relationship between government agencies and contract workers. In the first, a private company challenged the Ministry of Health's practice of outsourcing services to only one charity (it's 'long arm', according to the Ministry). In accepting the petition to compel the Ministry to hold a competitive procurement, the Supreme Court noted that, notwithstanding the Ministry's position, the charity's workers "are not civil servants; are not subject to state discipline or the civil service authority; rules and regulations that apply to employees in the civil service do not apply to the charity or to its workers".[27] According to this ruling, one may conclude that agency workers are not subject to civil service rules, in any shape or form. And yet, in a very different case, the Supreme Court ruled that a security guard in the Ministry of Interior, who was employed by a private security company, can be held accountable as a civil servant for receiving bribes.[28]

Following on from this troubling case, one may suggest another, more general, negative consequence of outsourcing by government agencies. In the traditional employment regime, employees are owed a duty of loyalty to an employer, coupled with more concrete duties to avoid situations in which conflicts of interest may arise, not to divulge sensitive information, and so forth. In addition, with regards to other workers, social bonds are expected to develop, fostering a feeling of common ethos and shared values (Estlund 2003). In contrast, the fragmentation of the workplace is expected to be not only detrimental to the workplace, but also to the possible development of the positive ethos and public values that the civil service is set to foster and nurture. Workers in outsourced services, after all, owe a duty of loyalty to their employer, which may be a for profit entity. Thus, we have witnessed social workers in outsourced services in Israel, reluctantly acting in a manner that verges, and even goes

[27] HCJ 5012/97 *Matan Health and Welfare Services v Ministry of Health* (1998), 68.
[28] ACA 1098/07 *Barak Cohen v the State of Israel* (2009).

beyond, the unethical and illegal, since they were directed to act in a manner that maximizes profits, sometimes at the expense of client welfare (Paz-Fuchs and Shlosberg 2012).

Loss of Expertise and Institutional Memory

In many cases, outsourcing of tasks that require expertise leads to the loss of knowledge that is critical for the task of maintaining and developing an effective service (Dannin 2008, 1372). Moreover, the loss of institutional knowledge and institutional memory may lead to the deterioration of the service. There are several reasons for this dynamic. First, by performing the task, the private contractor may, through her workers, accumulate relevant knowledge that is critical for the task. In one telling example, the State Comptroller noted that the Ministry of Health has become completely dependent on a non-government organisation – The Public Health Services Organisation – since the latter "has accumulated medical and paramedical personnel who have expanded its power as almost a monopoly provider of these services" (2009, 477). Over time, the public agency loses its ability to 'steer' the contractor and to supervise her actions, simply because the latter is far more aware of the needs of the tasks, and her portrayal of the job requirements will go unchallenged. Second, and closely related, even where the private provider is found to be at fault, in a way that cannot be explained away, it holds essential knowledge for the execution of the service that the public service has lost. This dynamic has led, on more than a few occasions, to the inability of the public sector to impose sanctions on the provider, who holds the key to the service. There has been, in other words, a reversal of power dynamics. Third, new and talented workers who are interested in taking part in meaningful public service roles (such as town planning or environmental engineering) will soon find that the 'real' work is being done in the private sector, for the public sector. Thus, the public service will be deprived of a vital new cohort of personnel who are very qualified for the role.

Conclusion

Outsourcing of personnel and outsourcing of services are both reasonable forms of management, when done in a bone fide fashion, to address the true needs of the corporation, or the government agency. Outsourcing of personnel, or the use of 'temp agencies', may be used, as the name indicates, to meet temporary manpower needs. Manufacturers, supermarkets or government agencies may purchase services through outsourcing because there is no expectation that they will employ air conditioning technicians or production designers.

Unfortunately, these legal forms of outsourcing have been used and abused by the Israeli civil service – ministries, agencies and local government – to circumvent post requirements and collective agreements. The outsourcing structure enables hiring workers at sub-par conditions, thus expanding the gap between the two tiers of the labor market, and creating impoverished public services. As a hybrid creature, this model was challenged quite frequently in employment tribunals, and inconsistent rulings

have created a degree of legal uncertainty. The relevant regulatory agencies in Israel – the Civil Service Commission, the General Accountant, the State Comptroller and, to an extent, the Employment Tribunals – are quite aware of the situation and have issued warnings as to current and foreseeable failures since the mid-1990s. And yet, government ministries, agencies and local authorities follow the guidance of the Finance Ministry and refuse to consider serious changes to employment structures in the public sector.

When section 12A of the *Manpower Act* 1996 came into force, government agencies were forced into making some adaptations, since the law now requires "insourcing" agency workers by the end user (in this case, the civil service or local authorities) after 9 months of agency employment. And yet, their response is clearly tactical and instrumental, rather than strategic and philosophical. Flexibility and cost saving are still declared as the central motivations, and regardless of the fact that they are often not the result of outsourcing, the effects on the rights and dignity of workers who, at the end of the day, provide a public service, are secondary.

Outsourcing in the public service has had significant institutional ramifications. Initially, it facilitated the avoidance of an honest conversation as to the feasible and ideal size of the public sector (Light 2006). Instead, government agencies prefer to change the title of civil service workers to agency workers, and from there – to "service providers". This change also allows governments to shed responsibility for public services, which should exist as part of their governing ethos, even beyond their legal obligation. Failure to live up to their duties through the engagement of agencies does not only undercut workers' rights and the ability to sustain a functioning government apparatus; it also misleads the public as to the true size of the public sector.

The challenges that confront those who are engaged with outsourcing of personnel in the public sector – regulatory agencies, employment tribunals, academics and NGOs – are not to be dismissed. The costs of this employment structure may exceed employing workers directly (Bresler-Gonen and Dowding 2008; POGO 2011); the supervision of their work is limited at best; the structure circumvents post limits and enables the expansion of civil service in a way that is unwarranted; the workers' rights are undermined; the professionalism and institutional memory within the service are endangered; the role of unions is diminished. Confronting these issues, without necessarily resorting to employing all those workers directly by the agencies (an unrealistic aim) is a formidable challenge indeed.

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